LEASE OF RAILROAD BY MAJORITY OF STOCKHOLDERS WITH ASSENT OF LEGISLATURE.

[*Continued from* 8 HARVARD LAW REVIEW, *page* 316.]

ANY and all of the corporate powers granted to the stockholders by the State can be taken from them by the grantor. The rescission of the entire grant, or any part of it, may be unconditional. A repeal of the provision that the stockholders may sue and be sued as one person would impose upon them and the public an inconvenience that would be serious, if it could not be mitigated by the company or the common law. A repeal of the requirement that the stockholders shall choose seven directors would remove a disability, and enable the stockholders to exercise the common-law right of agreeing upon an election of any number of directors or none. It is not for the grantees to say that the revocable grant shall not be amended. A legislative revocation of granted powers may be accompanied by a proviso that the grantees may retain them in a modified form. This is merely saying that the grantor can grant, and the grantees can accept, new powers instead of the old ones. The principle is the same whether the new powers are substitutes or additions. Without acceptance, they cannot become the powers of the grantees. An Act repealing the Northern charter, unless the stockholders accept a new power of leasing the road, would enable an objecting owner of one share to injure himself, and the other stockholders, and the public. The expediency of refusing to take the objector's share by an easy and harmless legal process that would pay him for it, is not a judicial question. If an amendment of the charter law can authorize a conveyance of one stockholder's share of the property by a lease for ninety-nine years, without his consent, and without prepayment of the value of his share, another amendment of the same law can convey all the property to a bankrupt and his heirs and assigns forever, without the consent of any of the owners, without payment of anything at any time, and without any security for payment. If either amendment would be an exercise of legislative power, no private property, real or personal, can be leased, loaned,

or sold by its owner until an amendment of the Constitution gives him a portion of the legislative power now vested in the Senate and House.

A manufacturing company having been incorporated in 1833, a statute of 1839 made the stockholders liable for corporate debts contracted after its passage, and a stockholder was held liable for a debt contracted in 1841.[1] The court say, "If the corporators were not satisfied with their individual liabilities, . . . they had it in their power to cease incurring them." The partners could alter their charter contract of partnership by continuing in business after the law of individual liability was changed by the Act of 1839. They could avoid an alteration of that part of the contract relating to liability by winding up the company. One of them, objecting to the alteration of his agreement, would be entitled to an injunction against the contraction of debts, or a legal process of dissolution, or some other adequate protection. None of them could prevent the change of the charter law on the subject of individual liability, and none could be compelled to become liable under a new law.

In 1846, a revocable power of New York banks to issue bank notes was conditionally revoked. The condition was that if any bank continued to issue notes after January 1, 1850, the stockholders should be individually liable, to a certain amount, for corporate debts contracted after that date. Time was given "to enable the proprietors of existing banking institutions to determine whether they would remain banks of issue, and assume the burden of individual liability, or avoid that consequence by winding up their affairs, or confining themselves to other branches of banking." All the stockholders of a bank, by continuing to issue notes after January 1, 1850, accepted the condition as an alteration of their contract.[2] In such a case in this State, a stockholder, seasonably objecting, would be entitled to an injunction against a continued issue of notes by his firm that would materially alter the partnership agreement concerning liability.

In Union Locks & Canal *v.* Towne, the amendatory legislation of 1809 and 1812 was an additional grant of corporate power to the company. The provision of § 17 of the Act of 1883 that "any railroad corporation may lease its road" is an additional grant of corporate power to the Northern Railroad

[1] Stanley *v.* Stanley, 26 Me. 191.

[2] In the matter of O. L. Bank, 21 N. Y. 9.

Company. In each case, the acceptance of the additional grant would be a material alteration of the charter contract of partnership. In each case, the additional as well as the original grant, like an ordinary deed of land, power of attorney, or official appointment, is permissive, not obligatory, and has no effect until accepted. The stockholders' acceptance of the leasing power granted to the Northern Railroad in the Act of 1883 would have the same effect as their acceptance of the same power if it had been granted in their Act of incorporation. By becoming a member of the company, every stockholder accepts the charter-grants of 1844. As the plaintiffs have not accepted the grant of 1883, and have not authorized their agents to accept it for them, the corporation, of which they are a part, have not accepted it. It can be accepted directly by a unanimous affirmative vote on the general question of acceptance. A unanimous vote in favor of a particular lease would be a bar against a stockholder's contesting that lease on the ground of a want of leasing power, and might be claimed to be an indirect general acceptance. Had the leasing power become one of the corporate powers by acceptance, it could be exercised, at any time, "upon such terms and for such time as may be or may have been agreed to by the directors, and as may be or may have been approved by two-thirds of all the votes cast on that subject by the stockholders," according to the express provision of the grant. As the directors and two-thirds of the stockholders voting on the question of acceptance are not the corporation, but only a part of it, and can have no other power than that of agents to act for anybody but themselves, the construction that the leasing power, granted to the company, can be accepted for the company by the directors and two-thirds of the voting stockholders, would make the grant a legislative attempt to give the company's agents a leasing power over the corporate property and business which those agents cannot give themselves, and which their principals have not given them. The only conclusion in favor of this construction is that the power of giving any agents any control over their principals' property or business is legislative in its legal character, and, being legislative, can be exercised by nobody but legislators in whom the Constitution vests it. And this would fall far short of the whole conclusion. An agreement of two parties, giving one of them authority to act for the other, is but one of an infinite number of possible contracts. If the power of making a contract of agency between these plaintiffs and

other stockholders is legislative, all contractual power is legislative. A decision sustaining this lease would change the private right of making contracts into a public right, take it from all private companies and private persons who now have it, and bestow it exclusively upon those who have the constitutional power of making law.

The contract made by the stockholders of the Union Locks & Canal with each other, and by the stockholders of the Northern Railroad with each other, and written in the charters of those companies, could have been so written as to authorize the directors, or a majority of the stockholders, or two-thirds of them, or each of them, or one of them specially designated, or any other person, acting as agents or agent of the company, to take the company, with the State's permission, into any and all business that men are capable of doing. In neither case is there such a contract, express or implied. In neither case is there a stipulation, express or implied, that a majority, or any other part of the company, may put the shares of the rest into any business except that specifically described in the contract, and any other that comes within the incidental power of doing what is reasonably necessary to enable the company to do that business.

In the present inquiry, it is not material whether the effort of a partnership majority to alter the partnership contract is made directly and in express terms, or indirectly by an acceptance of corporate power. A vote of the majority of the Farmers' and Mechanics' Store accepting a charter authorizing the firm to buy and sell ardent spirits, would have been as unavailing against the twelfth article, as the vote amending that article without an Act of incorporation. A material alteration of the partnership contract of the Northern Railroad effected by an acceptance of corporate power, or in any other way, being an exercise of authority which that contract does not confer upon the majority, is not validated by circuity of method. "The directors of the Northern Railroad, and two-thirds of the voting stockholders of that company may accept, for themselves and the other stockholders, the grant of leasing power hereby made to that company." Such a clause, in the Act of 1883, would have been inserted on the theory that the directors and two-thirds of the voting stockholders were thereby made State agents whose services could be dispensed with by enacting that "The leasing power, hereby granted by the State to the Northern Railroad, is hereby accepted by the State for that company." Either clause

would present the claim that all contractual power, including the right to make and alter partnership agreements, is legislative, and therefore, in every valid contract, the State is both parties.

"It is an admitted principle that in partnerships and joint stock associations, they cannot by a vote of the majority change or alter their fundamental articles of co-partnership or association, against the will of the minority, however small, unless there is an express or implied provision in the articles themselves that they may do it. . . . It is conceded that there is a class of alterations in a charter which the corporation may obtain and adopt, that would not so essentially change the contract as to absolve the corporator from his subscription, or give him a right to complain in a court of justice, in case he had previously paid it. Where the object of the modification or alteration of the charter is auxiliary to the original object of it, and designed to enable the corporation to carry into execution the very purpose of the original grant, with more facility and more beneficially than they otherwise could, the individual corporator cannot complain; and I should apprehend it would make no difference with the rights of a corporation, in such a case, though he could show that the charter, as amended, was less beneficial to the corporators than the original one would have been. The ground upon which such amendments bind the corporator, I deem to be his own consent. When he becomes a corporator by his signing for a portion of the capital stock, he in effect agrees to the by-laws, rules, and votes of the company, and there is an implied assent, on his part, with the corporation, that they may apply for and adopt such amendments as are within the scope, and designed to promote the execution, of the original purpose. . . . The consent or assent may . . . be implied where the amendment is not regarded as fundamental, and can be brought within the scope of the original purpose of the association. . . . It is not necessary that the business should be changed in kind to change the original purpose. If this [a railroad extension of thirty miles] is not a change in purpose, it would not be to extend the road in one direction to Canada line, and in the other to Massachusetts line."[1]

The proposed extension was held to be a change of the original purpose, and a violation of the stockholders' contract. The statement, in the opinion, that the majority may obtain and adopt an amendment of the charter making any change in the minority's con-

[1] Stevens *v.* R. & B. R. R. Co., 29 Vt. 545, 550, 554, 555.

tract that is not essential or fundamental, is explained by the context. As explained, it means not that the majority can thus make a change in the contract that would be a violation of it, but that when the company need the State's assent to corporate action that is within the express or implied power of doing what is necessary to carry into effect the specified purpose of the contract, the majority may apply for and accept an amendment giving such assent, — in other words, the majority may accept a legislative increase of the legislative grant of corporate power that will enable the company to perform the stockholders' contract.[1] Under this exposition of amendments that are not essential or fundamental, their legal effect and practical utility need not now be considered. Whatever explanations the statement concerning them may require in the various forms in which it occurs in the books, it cannot divert attention from the central point of inquiry. Under all versions of sound doctrine, the question in this State is whether the change which the majority propose to make in the corporate business against the objection of the minority, is a performance of their contract, or a violation of it, and not whether, in fact, the violation will probably be beneficial, nor whether, in fact or in law, it is so small or so enormous as to be approved or condemned by an arbitrary and boundless discretion. On the facts of this case, a leasing violation of the minority's legal right, however beneficial to them, is a legal cause of action on which they are entitled to judgment in some form of action.[2]

"A corporation like a partnership is an association of natural persons who contribute a joint capital for a common purpose. . . . Changes in the purpose and object of an association . . . are necessarily fundamental in their character, and cannot, on general principles, be made without the express or implied consent of the members. The reason is obvious. . . . The purpose and object . . . may be said to be the final cause of the association, for the sake of which it was brought into existence. To change this without the consent of the associates, would be to commit them to an enterprise which they never embraced, and would be manifestly unjust."[3] The retire-

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[1] Hanna *v.* C. & F. R. Co, 20 Ind. 30.

[2] Johnson *v.* Conant, 64 N. H. 109, 136.

[3] Railroad Co. *v.* Allerton, 18 Wall. 233, 235. Compare Lauman *v.* Lebanon Valley R R. Co., 30 Pa. St. 42; Clearwater *v.* Meredith, 1 Wall. 25, 39, 40, 41; Nugent *v.* Supervisors, 19 Wall. 241, 248, 249; Railroad Co. *v.* Georgia, 98 U. S. 359, 364; Sargent *v.* Webster, 13 Met. 497, 503, 504; Treadwell *v.* Salisbury Mfg. Co., 7 Gray, 393, 394, 397, 398, 404, 405.

ment of the Northern company from the industrial activity of common carriers to the leisure of mere rent-receivers was a change in the object of the partnership. The legal character of the change did not depend upon the circumstance that the partners never intended to perform all their mental and manual labor in person. The labor now done and the tolls now received on the road are not theirs.

". . . Because the corporators may, with the consent of the State, by the vote of a majority of two-thirds in interest, abandon their enterprise, sell out their property, and return his share of the proceeds to each stockholder, it does not follow that by the same authority the works may be leased to be carried on and conducted by others, the corporation continuing to exist. The right to elect the directors, by whom the business is to be managed, is a provision in the charter which the State or a majority cannot interfere with; it is a contract. The true question on that point here is whether the making of this lease and contract is an exercise of the power of managing the business and concerns of the corporation conferred in the charter, such as can be used by consent of a legal majority of corporators, without that of all." [1]

"The certificate for stock declares that the holder is entitled to a certain number of shares of the capital stock, which consists of the corporeal works and property, with valuable franchises to be used by the corporation for their profit, by the taking of tolls and fares, with the right to acquire and dispose of such property as may be essential in the legitimate exercise of their functions, under the management and control of directors, of whom any corporator, by and with the consent of the requisite number of his associates, may be one. The prospect of increased gains, consequent upon the growth of population and added business, is a valuable incident also to the ownership of the stock. Such are the rights vested in the stockholder under the law, and by virtue of his engagement with his associates, before the lease is effected. After the lease takes effect, his company is denuded of all these corporeal, substantial properties, its structure for the next 999 years is totally altered, and instead of what he before possessed, he would be compelled to accept an annual rent. . . . The shareholder would still have the paper upon which his certificate is printed, but in place

[1] Zabriskie, Chancellor, in Black *v.* Co., 22 N. J. Eq. 130, 407. (See also 22 N. J. Eq. 405, 408, 415, 416; and Zabriskie *v.* Hackensack & N. Y. R. R. Co., 3 C. E. Green, 183.)

of the earnings, he must be content with a share of the reserved rental in a corporation possessed of the single faculty of maintaining its organization for the distribution of such rent, stripped of all the franchises for the exercise of which it was founded. Without his consent, and against his protest, he would lose his share in the old thing, and be forced . . . into a new and wholly different venture. . . . For all substantial, practical purposes, a lease for 999 years is a conveyance in fee." [1]

"From the conclusions thus far reached, does it result that one unwilling stockholder may obstruct the growth and development of every enterprise of this character in which he may have participated, and thus hinder the union under one management of these important public highways which have been constructed at different periods and under separate charters, when the necessities of interstate commerce, and the convenience of public travel, may unite in urging it? Shall a railroad from Philadelphia to Trenton never be extended so as to connect the two great cities of our Union, while one obstinate associate stands in the way? . . . In the exercise of the right of eminent domain, the Legislature may authorize shares in corporations, and corporate franchises, to be taken for public uses upon just compensation." [2]

In Mills *v.* Central R. R. Co.,[3] under an alterable and repealable charter, and a subsequent statute authorizing all railway companies to lease their roads, a lease of the Central was held void on the ground, stated in Black's Case, that the corporate business could not be radically changed by the majority, and the ground, stated in Zabriskie's Case,[4] that the power of amendment and repeal was a power reserved by the State to modify and rescind the grant it had made, and not to authorize one part of the corporators to make radical changes in violation of the agreement of all.

The extension of the Old Colony Railroad from Fall River, in Massachusetts, to Newport, in Rhode Island, authorized by the Legislature and a majority of the stockholders, was held to be legal because the business to be done in Rhode Island was of the same kind as that done in Massachusetts.[5] The company would be a railway common carrier in both States. The court suggest

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[1] Van Syckel, J., in Black *v.* Delaware & R. Co., 24 N. J. Eq. 455, 464, 465.

[2] Van Syckel, J., in Black *v.* Delaware & R. Co., 24 N. J. Eq. 455, 468. (See also 24 N. J. Eq. 463, 466, 467, 485.)

[3] 41 N. J. Eq. 1.

[4] 18 N. J. Eq. 178, 185.

[5] Durfee *v.* Old Colony R. R. Co., 5 Allen, 230.

that a limit of the legislative power of amending the charter, even with the consent of the corporation, might perhaps be found in the doctrine that the corporate powers cannot be extended to enterprises or operations different in their nature and kind from those comprehended in the original charter.[1] As each stockholder, by taking a share under an alterable charter, assented to an exercise of the entire legislative power of alteration, the doctrine of the Old Colony Case is that he assented to an amendment authorizing the company to extend their road by connecting it with, and becoming lessees of, all similar roads, and taking assignments of all human business "of a nature similar to" that "embraced within the original grant of power." After the company had exhausted its power of expansion within the limit of similarity, this doctrine of the enlargement of one kind of business, if sound, would not sustain a legislative amendment authorizing the company to transfer all its possessions by a lease under which the lessee would take the place of the lessor in the lessor's common-carrier business. As that would be all the business of that kind in the world, the subsequent business of the lessor would be of a different kind. A leasehold extension of the Old Colony, leaving that company for a short time in the business of a common carrier on its original track between Boston and Fall River, followed by its transfer of that track to a lessee for ninety-nine years, would illustrate the difference between taking a lease and giving one. A legislative power of authorizing a majority of the stockholders to make leases, as well as accept them, would be based on the theory that each subscriber, by taking a share of stock and paying one hundred dollars to be used in building and operating a railroad from Boston to Fall River, agreed not only that he might be embarked in the operation of that and all other railroads, but also that he might be thrown out of the carrier business of the road he helped to build, and exposed to the risks of all the railway investments of mankind, except the one for which he subscribed. "The power of the proprietors, acting by a majority, . . . is limited to matters properly embraced within the purposes for which the corporation was created."[2]

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[1] Page 247.

[2] *In re* N. S. Meeting-house, 13 Allen, 497, 510. [Contrast Dorris *v.* Sweeney, 60 N. Y. 463, with S. & S. P. R. Co. *v.* Thatcher, 11 N. Y. 102; Buffalo, &c. R. R. Co. *v.* Dudley, 14 N. Y. 336, 348, 349, 355; and Union Hotel Co. *v.* Hersee, 79 N. Y. 454, 458.]

"The original charter conferred upon the company all the usual and necessary powers for locating and constructing a railroad from the town of Hartford to the city of New Haven. The ten shares subscribed for by the defendant were expressly taken upon 'the terms, conditions, and limitations' mentioned in the charter. And such would doubtless have been the legal effect of the subscription, had no reference to the charter been made in it. . . . Since entering into this contract, the plaintiffs have procured an amendment of their charter, by which they have superadded to their original undertaking a new and very different enterprise. . . . Instead of confining their operations to the construction and management of their railroad between Hartford and New Haven, they have undertaken to establish and maintain a line of . . . steamboats. . . . It is most obvious, if incorporated companies can succeed in establishing this sort of absolute control over the original contract entered into with them by the several corporators, there is no limit to which it may not be carried short of that which defines the boundary of legislative authority. The proposition is too monstrous to be entertained for a moment."[1]

"That case," says Selden, J., in B. & N. Y. R. Co. *v.* Dudley,[2] "is in direct conflict with several English cases." Parliament having authority to make any person a member of any incorporated or unincorporated partnership without his consent, and to make any alteration in his helpless condition, and the question in English courts being merely whether Parliament intended to exercise this non-legislative power, the decisions of that question are inadvertently cited in a manner that tends to throw doubt upon all constitutional security of private rights, and to countenance the idea that the people of New York are living under a government as absolute as the one they cast off when they ceased to be subjects of Great Britain.

Cases in which a construction is given to the exercise of the unlimited power of Parliament, without occasion to consider the legal nature of legislative power, and without regard to the question whether the absolute sovereignty exercised in a particular instance is legislative, judicial, or executive, or neither, have a tendency, so far as they are followed in this country, to obliterate an essential feature of American government, and to re-establish the arbitrary dominion that was extinguished in this State by the

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[1] H. & N. H. R. Co. *v.* Croswell, 5 Hill, 383, 385, 386.

[2] 14 N. Y. 336, 355.

Constitution.[1] The argument from British precedent begs the question of legislative authority, and takes it for granted that the people of New Hampshire, who went through the Revolution for rights of life, liberty, and property which they considered natural, essential, and inherent,[2] proceeded deliberately, at the close of the struggle, to set up a government as despotic as the one they overturned. The argument proves too much. If it had any force it would show that the members of the Senate and House, by amending wills, conveyances, and laws, can transfer to themselves all property, public and private, that is subject to their legislative control.

The usage of the American Colonies and States before the adoption of constitutional limitations, has been a misleading precedent. In Rice *v.* Parkman[3] (decided in 1820), a legislative resolve, passed in 1792, had authorized A to sell and convey the real estate of B and C. Of this resolve the court said: "It is not legislation, which must be by general acts and rules, but the use of a parental or tutorial power for purposes of kindness." "The only object of the authority granted by the Legislature was to transmute real into personal estate for purposes beneficial to all who were interested therein. This is a power frequently exercised by the Legislature of this State since the adoption of the Constitution, and by the Legislatures of the Province and of the Colony, while under the sovereignty of Great Britain, analogous to the power exercised by the British Parliament, on similar subjects, time out of mind." Under the non-legislative reign of Parliament, and the pre-constitutional government of this State, there was no limit of governmental power to be decided or considered by the court. The Acts of banishment and confiscation passed and enforced by the provisional government of the Revolution[4] were as valid as the *Habeas Corpus* Act.[5] If, upon true construction, not modified by usage, the Massachusetts Legislature of 1792 could authorize A to make the conveyance that was upheld in Rice *v.* Parkman, they could make the conveyance without delegating their authority, could sell A's property without his consent, or authorize B and C to sell it, and can act as guardian and absolute sovereign in all cases in which they choose not to employ agents in their

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[1] H. R. Co. *v.* Brand, L. R. 4 Eng. & Ir. Ap. Cases, 171, 196.

[2] Bill of Rights, Art. 2.

[3] 16 Mass. 326.

[4] Acts of Nov. 19 and 28, 1778, Belknap, Hist. N. H., ch. 26.

[5] Atherton *v.* Johnson, 2 N. H. 31, 34; Thompson *v.* Carr, 5 N. H. 510; Gould *v.* Raymond, 59 N. H. 260, 272–275; Jackson *v.* Stokes, 3 Johns. 151.

unlimited control of property and its owners. And if, in addition to the powers of eminent domain, taxation, and police, the Senate and House have a general power of conveying what the State does not own, they can lease any railroad on any terms to whom they please, and dispose of any private property as they see fit, can transfer all real and personal estate to one man, or make an annual distribution of it, or enact a universal community of interest in it, and leave it, in common and undivided, to be used by the strongest. On the question of power, English precedent and the pre-constitutional practice of this country establish either boundless despotism or nothing.

In Massachusetts, as well as in New Hampshire, the law-making branch of government did not wholly abstain from non-legislative Acts after the adoption of the legislative limitation. In this State, the Senate and House continued to grant new trials until 1817.[1] The same practice, continued in Massachusetts after the adoption of the State Constitution, is now held to be illegal.[2] But the continued exercise of the non-legislative and unlimited power of Parliament and the pre-constitutional government of Massachusetts, in the conveyance of property not belonging to the State, was held legal in Rice *v.* Parkman, which has become a leading case.[3] The contrary doctrine has been settled here sixty years.[4] If the property of incorporated or unincorporated partners can be leased for ninety-nine years without the owners' consent, it can be sold without their consent. In Massachusetts and other States, the legislative power of selling private property for the owners' benefit is a survival of the consolidated form of government that enabled parliament and the colonial assemblies to disregard the difference between making law and administering it. When one sale of such property is ordered by a judicial decree,[5] and another sale of the same kind and for the same purpose is ordered by a vote of the Senate and House, either the court legislate, or the legislature exercise judicial power. There is usurpation on one side or the other.

If a reservation of the power of amending a general or special Act of Incorporation is a creation, and a conveyance to the legislature, of a non-legislative power of altering a partnership contract

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[1] Merrill *v.* Sherburne, 1 N. H. 199.

[2] Quincy Mass. Reports, 473, *n.* 17.

[3] Cooley, Const. Lim. 97–106.

[4] 4 N. H. 572, 573, 574.

[5] Old South *v.* Crocker, 119 Mass. 1, 26, 27; Bamforth *v.* Bamforth, 123 Mass. 280; Petition of Baptist Church, 51 N. H. 424; Society *v.* Harriman, 54 N. H. 444, 446; Gray, Perpetuities, s. 590, *n.* 3.

authorized by the same Act, the Senate and House, by reservation, can create and acquire the non-legislative power of altering all agreements. "All future contracts, not made under and in accordance with this Act, are prohibited. The power of making a contract under this Act is granted to those only who accept and exercise the granted power with and upon the condition that the contract may be amended by a power hereby reserved and hereby vested in the legislature. This Act shall be a part of every contract; and every stipulation excluding it, and every device for evading it shall be illegal and void. All law inconsistent with this Act is hereby repealed." Such an Act in amendment of the law of contracts would assume, not that partnership and all other private contracts are laws of the land, makable and alterable only by law-makers, but that they are not laws, and can be made and altered by persons who are not legislators, and that the non-legislative power of altering them can be reserved by the Senate and House, and added to the law-making power of those assemblies. The power thus reserved would be appropriately exercised by such acts as these: "A's written agreement to pay B $10, ten months after date, without security (or with such security only as a court can give by preventing the debtor's diversion of his property from the payment of the debt before it is due, when the threatened and wrongful diversion is found upon a judicial trial), is hereby amended: the debtor shall give security by paying $1 a month to the trustee of a sinking fund of which the creditor is hereby appointed trustee; but if the debtor chooses to avoid the risks of the sinking trust, he may pay $1 a month to the creditor as creditor." "B's indebtedness to A, secured by mortgage, is hereby amended: the mortgage is discharged." "C's agreement to pay D $10 is hereby amended: the debtor shall pay $100." "The partnership agreement of E, F and G to run a daily coach between Concord and Lebanon is hereby amended: a majority of them may assign all the partnership business to H by a lease of all the partnership property for ninety-nine years." Each of these amendments would be enacted to overcome an objection made by one of the contracting parties to an alteration of his agreement. The amendments would not be valid unless they were law. If they would be law, they could not be made by the contracting parties, and the original contracts and all other agreements not made by law-makers would be void.

In the supposed case of A's unsecured indebtedness, a legisla-

tive amendment requiring him, without due process of law, to give such security as his creditor could obtain for due cause shown in a judicial proceeding, would assume that any judgment which one branch of the government can render after trial, another branch can render without a trial; that each branch can do whatever can be done by either of the others; and that their prohibited union[1] has been effected in a triple form. If the State happened to be the creditor, this amendment would be both a commission issued by the creditor appointing himself judge of his own case, and a judgment rendered by him for the enforcement, not of his legal rights legally ascertained, but of his view of them. A reserved power of amendment that could thus alter a contract of the State, could confer upon any creditor the right of rendering summary judgment against his debtor without trial, and could authorize any debtor to enforce his view of his rights in the same manner.

The supposed amendment of the partnership contract, accompanied by a statutory regulation of the powers of partners under all partnership contracts subsequently made, would mark the distinction between the legislative character of an Act that is general and prospective, and the non-legislative character of one that is special and retrospective. One is an effort to make a contract for E, F and G by altering their agreement, and to bind them by a partnership contract they have not made: the other requires no one to be a partner.

All rights of property are not contractual; and there are other rights besides those of property: but persons of contractual capacity, who are under the necessity of making any purchase, sale, or other agreement, have no rights that cannot be taken from them by statute, if the Senate and House can reserve the non-legislative power of amending contracts. An Act providing that "All rights of property, liberty, and life of every person hereafter making any agreement, may be amended by the legislature," would complete the restoration of despotism. Governments established by agreement can be changed or abolished by agreement: but the government which the legislative, judicial, and executive servants of the State are sworn officially to support, is the limited one established in 1784, and not the unlimited one that was then abolished.[2]

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[1] Ashuelot R. Co. *v.* Elliot, 58 N. H. 451, 452, 453.

[2] Gould *v.* Raymond, 59 N. H. 260, 272–275.

The eleventh section of the charter of the Northern Railroad is, "The Legislature may alter, amend, or modify the provisions of this Act, or repeal the same, notice being given to the corporation, and an opportunity to be heard." If the decision in this case depended on the question of fact whether the company had notice and an opportunity to be heard on the proposed passage of the Act of 1883 (ch. 100), the defendants could be allowed, in some proceeding, to show why that question was not tried at the trial term, and the reasons, if any there are, for a new trial of the case on that point. The view most favorable to the lease is that the requirement of notice and an opportunity to be heard was complied with, or was void. The case is decided without any consideration of the effect of the requirement, upon the assumption that it was complied with, and that, for the practical purposes of this case, the performance of the condition gave § 11 the force of an unconditional reservation of the power of alteration and repeal.

"The reservation affects the entire relation between the State and the corporation, and places under legislative control all rights, privileges, and immunities derived by its charter directly from the State." [1] "It was a reservation to the State. . . . The State was making what had been decided to be a contract, and it reserved the power of change, by altering, modifying, or repealing the contract. . . . It was to avoid the rule in the Dartmouth College Case, not that in Natusch *v.* Irving, that the" reservation "was made." [2]

In Stewart *v.* Little Miami R. Co.,[3] one of the grounds on which a provisional injunction against a change of railway location between unaltered termini was refused was, that "the original charter conferred authority to make the alteration complained of." Another ground was, that the plaintiffs by the suit sought protection for their interest as stockholders; that "their interest as landholders upon the route" was their main interest; that were it not for their landholding interest, the injury to their stock would not be a cause of complaint; and that the construction of "a great and important public work" should be suspended by injunction only "to prevent injuries that would otherwise be irreparable, or when the magnitude of the injury to be dreaded is so great, and the risk so imminent, that no prudent person would think of incurring it. Then

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[1] Tomlinson *v.* Jessup, 15 Wall. 454, 459.

[2] Zabriskie *v.* Hackensack & New York R. R. Co., 18 N. J. Eq. 178, 185, 186.

[3] 14 Ohio, 353.

the complainants' right is doubtful; or an action at law or in chancery, prosecuted in the ordinary mode, will afford adequate redress." It was not shown that the public character and importance of the road would legalize a change of route or business in violation of the plaintiffs' rights,[1] and the decision has not shaken the settled doctrine that in this class of cases the plaintiff need not prove actual damage, and is not defeated by proof that he will be benefited by the unauthorized change. The beneficial character of the change may tend to prove the purpose of his litigation, and to disprove his claim for substantial damages in an action at law; but of itself alone, without a purpose inequitable in a legal sense, it is not an answer to a bill for an injunction.[2]

By their charter-contract all the stockholders of the Northern Railroad agreed that their partnership business should be the transportation of passengers and freight on their road, including certain incidental enterprises contributing to the transaction of that business. They formed the partnership for no other private purpose than the benefit to be derived from their performance of this contract, legally altered as it may be, under legislative permission, by their express or implied assent. No alteration has authorized a part of the company to suspend the company's performance of the contract by transferring their road and business to other principals for ninety-nine years. The plaintiffs have not acquiesced in the transfer and suspension, but have objected seasonably, and presumably in good faith for the purpose of protecting their Northern shares. The lease violates the partnership contract, and takes from the plaintiffs an equitable estate of ninety-nine years without their consent and without prepayment of the value of the estate taken. Whatever names are used to designate the trust and agency of the corporate partnership and the relation existing between each stockholder and the company, he has some remedy for their breach of the contract. "Wherever there is a legal right vested in a party, he must, in some court, have the means of enforcing that right."[3]

The private property of the Northern Company, subject to a public right of transportation, is held in trust by the corporation for the benefit of the stockholders. The corporation is trustee, holding the legal title. The stockholders are the beneficiaries, holding the equi-

[1] 54 N. H. 648.
[2] Central R. Co. *v.* Collins, 40 Ga. 582, 617.
[3] Adley *v.* Whitstable Co., 19 Ves. Jr. 304, 305.

table interest. "The jurisdiction to enforce performance of trusts arises where property has been conferred upon, and accepted by, one person on the terms of using it for the benefit of another." [1] The rule is that the equitable ownership includes a legal right to a performance of the trust which can be specifically enforced in a court of equity; and the authorities do not recognize a breach of corporate trust as an exception to the rule.[2] "A private or trading corporation is essentially a chartered partnership, with or without immunity from personal liability beyond the capital invested, and with certain other convenient attributes which ordinary partnerships do not enjoy. It is also something more than a partnership, because the legal or artificial person becomes vested with the title to all the estate and capital contributed, to be held and used, however, in trust for the shareholders. . . . The original subscribers contribute the capital invested, and they and those who succeed to their shares are always, in equity, the owners of that capital. But, legally, the ownership is vested in the corporate body, impressed with the trusts and duties prescribed in the charter." [3] Regarded as an imaginary person, the incorporated partners are a trustee whose breach of trust is restrainable by injunction at the suit of an objecting beneficiary, however profitable the breach may be to him. If the artificial body is disregarded, the partnership is as solid a ground of equity jurisdiction without the corporate fiction as with it.[4] "The important principle that one out of any number of shareholders or partners is entitled to the protection of the court against the illegal acts of the others, although he stands alone, was emphatically declared and strictly carried out by Lord Eldon in Natusch *v.* Irving, and Const. *v.* Harris. . . . In those cases Lord Eldon was dealing with partnerships and unincorporated companies; but precisely the same principle applies to all companies, whether incorporated by Act of Parliament, charter, letters-patent, or registration." [5]

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[1] Adams, Eq. 26.

[2] Adley *v.* Whitstable Co., 19 Ves. Jr. 304, 306; Dodge *v.* Woolsey, 18 How. 331, 341–344; Hawes *v.* Oakland, 104 U. S. 450, 457, 458, 460; Greenwood *v.* Freight Co., 105 U. S. 13, 16; Stevens *v.* R. Co., 29 Vt. 545, 564; Peabody *v.* Flint, 6 Allen, 52, 56; Brewer *v.* Boston Theatre, 104 Mass. 378, 386, 395, 396; March *v.* Eastern R. Co., 40 N. H. 548, 567.

[3] Comstock, C. J., in Bissell *v.* M. R. Co., 22 N. Y. 258, 270, 274, 275.

[4] Story, Eq. c. 15.

[5] Lindley, Partnership, 900.

An injunction against the lease as a breach of the Northern trust, is, in effect, a decree that the trustee specifically perform the charter-contract and the trust declared in it. In the bill, the plaintiffs ask that the Northern company and their directors be ordered to resume the control, management, and operation of the Northern road. A decree for the plaintiffs, whether affirmative or negative in form, would run against the trustee, — not a mere imaginary person, but the whole body of stockholders, whose performance of their corporate trust is performance of their partnership contract. Whether the plaintiffs' rights, accruing from the contract, are called contractual, or fiduciary, they are subject to the general rule that inequitable performance is not specifically enforced when recoverable damages for non-performance are an ample remedy. The equity to compel specific performance of contract arises where an agreement, binding at law, has been infringed, and the remedy at law by damages is inadequate.[1] But the adequacy of a compensatory suit on a broken contract does not always depend upon the breach being financially injurious to the plaintiff. A breach that would be pecuniarily beneficial to him may be of such a nature in other respects that nothing short of prevention will be just. If the price fixed by a written executory agreement for the sale of a farm is more than the value, that fact is not an answer to a bill brought by the purchaser against the vendor for specific enforcement of the agreement. The purchaser, financially benefited by the violation of his legal right, would be financially injured by resorting to the remedy of a suit for nominal damages. "Compensation in damages, measured by the difference in price as ascertained by the market value, and by the contract, has never been regarded in equity as such adequate indemnity for non-fulfilment of a contract for the sale or purchase of land, as to justify the refusal of relief in equity."[2] The vendor's payment of the difference is not regarded by the law as a full, sufficient reparation for the purchaser who made the contract "on a particular liking to the land."[3] The damage is irreparable in the legal sense.

A written contract of farming partnership may be specifically enforced by an injunction against its violation when a majority

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[1] Adams, Equity, 77; Story, Eq. §§ 716, 717, 717 *a*; Fry, Spec. Perf. § 40; Pomeroy, Spec. Perf. § 3; Express Co. *v.* R. Co., 99 U. S. 191, 200; Eckstein *v.* Downing, 64 N. H. 248; Black *v.* D. & R. Canal Co., 22 N. J. Eq. 130, 399.

[2] Jones *v.* Newhall, 115 Mass. 244, 248.

[3] Buxton *v.* Lister, 3 Atk. 383, 384; Story, Eq. § 717.

of the partners make an unauthorized attempt to turn the whole partnership property and business over to other principals for ninety-nine years, in exchange for an annuity or other investment. On the question of equity jurisdiction, the mere expediency of the exchange as a financial measure would be as immaterial as the corporate or unincorporate form of the partnership organization. The recovery of one dollar by an expenditure of one hundred in a suit at law would not be a sufficient remedy for a partner objecting to the illegal change of his business. Specific relief would not be less necessary than in the case of a refusal to perform a written agreement for the sale of land.

Performance of the Northern charter-contract would not be rendered inequitable in law by the mere fact of non-performance being more beneficial to the stockholders. The plaintiffs' equitable right to be principals in the common-carrier business between Concord and Vermont according to their contract, would not be barred by a finding that it would be better for them to exchange that business for the occupation of a lessor, or the business of a road running from Concord to Maine or Massachusetts. They have not agreed that their partners may take them from the stipulated position of principals in the work of carrying passengers and freight between Concord and Lebanon, and give them any other vocation in which a court or jury may think they would be more profitably and judiciously employed. Their expulsion, for ninety-nine years, from the Northern carrier business, in violation of their partnership contract, is a case in which the general principle of equity gives an injunction, and the evidence shows no exceptional reason for withholding the specific relief necessary to prevent their wrongful exclusion from their chosen employment.

Charles Doe.